

TITLE 10. CALIFORNIA DEPARTMENT OF CORPORATIONS FINDING OF EMERGENCY

Pursuant to Government Code Section 11346.1, the Commissioner of Corporations ("Commissioner") adopts changes to Rules 260.102.19, 260.140.41, 260.140.42, 260.140.45, and 260.140.46 under the Corporate Securities Law of 1968 (Title 10, Chapter 3, Sections 260.102.19, 260.140.41, 260.140.42, 260.140.45, and 260.140.46 of the California Code of Regulations) as emergency regulations. These emergency regulations relate to the exemption from qualification for certain securities offerings through option plans and purchase plans.

INFORMATIVE DIGEST

SB 1837 (Chap. 705, Stats. 2000) provides that certain offerings of securities through option and purchase plans (hereafter compensatory benefit plans) of limited liability companies are exempt from the qualification requirements of the Corporate Securities Law of 1968. (Option and purchase plans are securities offerings to employees, directors and consultants of an issuing company that are used as an incentive to acquire and retain such persons, and are not intended for capital raising purposes.) SB 1837 further provides that the securities offerings must comply with specified regulations in order to be exempt from qualification. However, the specified regulations describe standards for offerings of shares of stock by a corporation pursuant to a compensatory benefit plan, thereby creating ambiguity as to whether the same standards are applicable to offerings of interests in limited liability companies.

Accordingly, the Commissioner proposes to amend Sections 260.102.19, 260.140.41, 260.140.42, 260.140.45, and 260.140.46 of Title 10, Chapter 3 of the California Code of Regulations to clarify that the existing standards for securities offerings under compensatory benefit plans apply equally to all types of securities issued under such plans, not just shares of stock issued by corporations.

The Commissioner further proposes to amend Section 260.102.19 to clarify the procedure for filing the notice of transaction for the issuance of securities under a compensatory benefit plan. The existing rule requires that a notice be filed within 30 days after the initial issuance of a security. The Commissioner proposes amending the language to require the notice to be filed not later than 30 days after the initial issuance of a security, to reflect the change in wording made by SB 1837, and to clarify that the security must be issued in California to trigger the notice filing requirement.

AUTHORITY

Section 25610, Corporations Code.

REFERENCE

Section 25102(o), Corporations Code.

FINDING OF EMERGENCY

These emergency regulations are necessary for the immediate preservation of the public peace, health safety, or general welfare for the reasons set forth below.

As a result of SB 1837, effective January 1, 2001, limited liability companies may offer securities through compensatory benefit plans without seeking qualification of the offering through the commissioner. The proposed emergency regulations are necessary to protect the investing public by ensuring that securities offered pursuant to a compensatory benefit plan provided by a limited liability company meet the same minimum standards that currently exist in the regulations for corporations claiming the exemption.

The proposed amendments are also necessary to provide a limited liability company with adequate guidance on the standards necessary to perfect the claim of the exemption from qualification for securities offered pursuant to a compensatory benefit plan, thereby assisting the limited liability company in avoiding exposure to liability for improperly relying on an exemption for which it may not qualify. The failure to qualify a security gives rise to the right of rescission on the part of a security holder, and therefore the potential financial exposure (in the form of a contingent liability) of a limited liability company for improperly claiming an exemption could be significant.

The proposed changes provide clarity to Section 25102(o) of the Corporations Code, as amended by SB 1837. Without the emergency regulations, a limited liability company offering securities pursuant to a compensatory benefit plan would not know whether the exemption provided by SB 1837 requires the company to meet the same standards set forth in the regulations for corporations issuing shares of stock, or whether those standards are limited to “stock” issued by “corporations,” and thus inapplicable to securities issued by limited liability companies.

The proposed regulations clarify that the standards in the regulations apply to all types of securities offered pursuant to a compensatory benefit plan, not just shares of stock offered by a corporation, thereby protecting the investing public against offerings not in compliance with the regulations, protecting issuers against liability for improperly relying on an exemption from qualification, and clarifying the scope of the standards for issuers.

These emergency regulations will preserve public peace and general welfare by alleviating the regulatory burdens and confusion on a limited liability company seeking to claim the exemption from qualification. Compensatory benefit plans have become an important tool for California businesses to attract and retain a workforce, and therefore the standards for qualification for such offerings, or the standards for an exemption from qualification for such offerings, are very important to California businesses.

The legislation providing the new exemption from qualification for a limited liability company offering securities pursuant to a compensatory benefit plan is effective January 1, 2001, and the Department of Corporations requires several months to draft rulemaking packages. Therefore, insufficient time exists for the normal regulatory adoption procedures, and emergency regulations are necessary for the preservation of the public peace, health, safety, or general welfare. The Department of Corporations is currently receiving inquiries as to the applicability and interpretation of the new exemption.

COST TO LOCAL AGENCIES AND SCHOOL DISTRICTS

The proposed regulation does not impose a mandate on local agencies and school districts. No other direct or indirect costs or savings to local agencies or school districts required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, of the Government Code, or other nondiscretionary cost or savings imposed on local agencies are applicable.

COST OR SAVINGS TO STATE AGENCY

No other nondiscretionary costs or savings to state agencies. No direct or indirect costs or savings to the state or in federal funding.

CONTACT PERSON

Comments or inquiries concerning these proposed regulation changes may be directed to Colleen E. Monahan, Corporations Counsel, Office of Policy. Department of Corporations. 980 Ninth Street, 5th Floor. Sacramento, California 95814. (916) 322-3553.

Dated: December 19, 2000
Sacramento, California

WILLIAM KENEFICK
Acting Commissioner